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NO. 82-1529

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WINDWARD PARTNERS, a registered Hawaii Partnership, et al.,

Petitioners,

vs.

GEORGE ARIYOSHI, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

and

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Marks

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QUESTIONS FOR REVIEW

1. Was the United States Court of Appeals for the Ninth Circuit Court correct in its decision that the purchase by the State of Hawaii, under threat of condemnation of property which Plaintiffs held an option to purchase, was not a "taking" for which just compensation was required when the purchase expressly was made subordinate to the option.
2. Was the Court of Appeals correct in its decision that Plaintiffs' claims against the State Defendants were barred in the federal judicial system by the Eleventh Amendment to the Constitution of the United States of America.
3. Was the Court of Appeals correct in its decision, once it found (a) the conspiracy count failed to state a cause of action and (b) the Eleventh Amendment stripped it of jurisdiction to consider

Plaintiffs' claims against the State Defendants, that the federal court was without jurisdiction over the Private Defendants absent the establishment of any independent basis of federal jurisdiction over the Private Defendants.

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Statement of the Case

I. Nature of the Case

The dispute which culminated in this Petition for a Writ of Certiorari had its origin in the purchase by the Hawaii Housing Authority[1] of the Mauka Waiahole Properties[2] from Elizabeth Loy McCandless Marks.[3] When Mrs. Marks conditionally agreed in May, 1977, to sell the Property to the HHA,[4] the Property

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1/ Hereinafter referred to as the "HHA." The HHA is "a public body and body corporate and politic with perpetual existence." Haw. Rev. Stat. Sec. 356-5.

2/ Some six hundred acres of undeveloped rural land, hereinafter referred to as the "Property."

3/ Hereinafter referred to as "Mrs. Marks."

4/ Purchase Agreement under Threat of Condemnation (hereinafter referred to as the "Purchase Agreement"). A copy of that document is attached to the Second Amended Complaint (CR 97) as Exhibit "F."

was owned in fee by her, and was encumbered by an option to purchase previously granted by her granted to Windward Partners. The right of the HHA under its Purchase Agreement with Mrs. Marks expressly was made subordinate to Windward Partners' option.

Windward Partners notified Mrs. Marks in October, 1977[5/] that it would not exercise its option to purchase. If not terminated by that notice, the option expired by its own terms, through lack of exercise.[6/] In late November, 1977, the HHA purchased the Property from Mrs. Marks. In June 1978, Windward Partners filed

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5/ By letter to Mrs. Marks dated October 20, 1977, from Harold K. Lewis, as Chairman of Windward Partners' Executive Committee.

6/ See Transcript of Proceedings, July 10, 1980 (RT at 22), wherein Windward Partners conceded that the option had expired.

this action alleging, inter alia, deprivation of Windward Partners' constitutional rights, by the HHA's "taking" its already expired option agreement without due process or payment of just compensation. The Judgment (CR 84) of the United States District Court for the District of Hawaii dismissed Windward Partners' Second Amended Complaint, on grounds of failure to state a claim against the State Defendants upon which relief could be granted and lack of jurisdiction over Mrs. Marks and her attorney, Alan C. Kay. The United States Court of Appeals for the Ninth Circuit affirmed the Judgment of the District Court. From the decision of the Court, of Appeals, Windward Partners seeks a writ of certiorari.

II. Course of the Proceedings

This action commenced on June 30, 1978, when Windward Partners filed its Verified Complaint (CR 1) alleging four "causes of action":

(1) violation of Windward Partners' Fifth and Fourteenth Amendment rights by the State

Defendants[7], by non-specific allegations of deprivation of due process and taking of property without just compensation;

(2) intentional and willful breach of contract by Mrs. Marks;

(3) conspiracy between Mrs. Marks and her attorney, Alan C. Kay, to interfere with Windward Partners' contractual rights; and

(4) willful and malicious conduct on the part of Mrs. Marks and Mr. Kay, detrimental to Windward Partners' rights.

Declaratory and injunctive relief, and monetary damages in the amount of $20 million were sought.

The Complaint alleged federal jursidction over the State Defendants pursuant to the

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7/ Defendants George Ariyoshi, Governor of the State of Hawaii; Franklin Sunn, Director of HHA; and Tony Taniguchi, Paul Tom, Andrew Chang, Wilbert Eguchi, Lawrence Ing, David Slipher, Wayne Takahashi and Nobuyoshi Tamura, Commissioners of HHA (hereinafter collectively referred to as the "State Defendants").

Fifth and Fourteenth Amendments to the federal constitution; 28 U.S.C. Sections 1331, 1343 and 2201; and 42 U.S.C. Section 1983. The Complaint alleged federal jurisdiction over Mrs. Marks and Mr. Kay on a pendent party (as opposed to pendent claim) theory. Windward Partners asserted that Mrs. Marks and Mr. Kay were named as defendants by virtue of having been "joined under the pendant (sic) jurisdictional powers of the court in that plaintiffs' complaint against (Mrs. Marks and Mr. Kay) and Defendants Ariyoshi, Sunn and the HHA Commission arise out of the same transactions." (CR 1, paragraph 4.)

Noting the facial jurisdictional defects, all Defendants filed Motions to Dismiss.[8/] One week later, prior to any hearing on those Motions, Windward Partners filed its First

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8/ Defendant Elizabeth Loy McCandless Marks' Motion to Dismiss (CR 11); Motion to Dismiss Complaint against Alan C. Kay (CR 12); State's Motion to Dismiss (CR 13).

Amended Verified Complaint (CR 18)[9/] on August 14, 1978.

The First Amended Complaint parroted the original. Although Windward Partners added an additional plaintiff (Harold K. Lewis), appended two more exhibits and included two minor new allegations, the First Amended Complaint mirrored the original Complaint's jurisdictional statement and causes of action. Because of the virtual identity of the complaints, all parties stipulated (CR 31) that the previously filed Motions to Dismiss would be deemed responsive to the First Amended Complaint.

At the hearing on the Motions to Dismiss, the District Court focused upon the fact that the HHA purchased, and did not condemn, the property of Mrs. Marks. There was no "taking" in the constitutional sense, to which any deprivation

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9/ Hereinafter referred to as "First Amended Complaint."

of due process or failure to pay just compensation might be ascribed. Transcript of Proceedings, April 4, 1980 (RT at 16). The District Court concluded that the First Amended Complaint failed to state a cause of action against the State Defendants.

> THE COURT: I grant a motion to dismiss as to them (State Defendants) on the basis that the complaint fails to state a cause of action upon which relief may be granted. While it concludes that the State has taken their (Windward Partners') property without due process of law, the allegations that support that conclusion are that they (the State Defendants) got a deed from Mrs. Marks that didn't reserve any rights in the plaintiffs. So, seems to me that any beef they have is against Mrs. Marks and not against the State Defendants.

Transcript of Proceedings, April 4, 1980 (RT at 28).

Having disposed of the claims against the State Defendants, the District Court then addressed the lack of jurisdiction over the remaining defendants.

> THE COURT: Secondly, I dismiss as to Mrs. Marks and Mr. Kay for lack of jurisdiction. If there is any cause of action against either of them, there's no jurisdiction of that cause of action in this court.

Transcript of Proceedings, April 4, 1980 (RT at 28).

Undaunted, Windward Partners filed a Second Amended Complaint (CR 97),[10/] amending the previous complaint by including:

(1) a new paragraph 3a in the first cause of action alleging the previously claimed federal statutory basis of jurisdiction--Fifth and Fourteenth Amendments, and 28 U.S.C. Sections 1331 and 1343--against all Defendants (the State Defendants, Mrs. Marks and Mr. Kay) regarding the new fourth cause of action;

(2) a second amendment to the first cause of action claiming that the property which the State took from Windward Partners' interest was its option contract with Mrs. Marks to purchase the Property;

10/ Filed on October 15, 1980, nunc pro tunc as of May 14, 1980, pursuant to District Court order (CR 95). Hereinafter referred to as "Second Amended Complaint."

(3) a new fourth cause of action alleging a conspiracy among the State Defendants, Mrs. Marks and Mr. Kay to deprive Windward Partners of its civil rights; and

(4) the former fourth cause of action renumbered as a fifth cause of action.

The District Court concluded that the amendments added nothing of substance to the previously filed complaints, and dismissed the action. As a basis for its decision, the District Court focused upon the facts that (1) the Property was purchased, rather than "taken" by condemnation; (2) Windward Partners' option agreement had expired prior to the State's purchase of the Property; and in any event, (3) the State's contractual right to purchase was subordinate to whatever interest Windward Partners might have in the property. Transcript of Proceedings, July 10, 1980 (RT at 22-24, 36). The Court of Appeals, in affirming the District Court's decision,

concluded that the alleged interference with Windward Partners' financing opportunity did not constitute a taking of a compensable property right.

III. Statement of the Facts

On May 21, 1975, Mrs. Marks entered into a "Land Exchange and Purchase Agreement"[11/] with Pao Investment Corporation. The Exchange Agreement contemplated a series of transactions whereby Mrs. Marks would exchange her interests in certain lands, including the Property, for interests in real property to be conveyed to her by Pao Investment Corporation if Pao Investment Corporation chose to do the things entitling it to require Mrs. Marks to make the exchanges. (CR 1 at paragraphs 5 and 6). By Letter Agreement dated May 21, 1975, Pao

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11/ Hereinafter referred to as the "Exchange Agreement." A copy of that document is attached to the Second Amended Complaint (CR 97) as Exhibit "A."

Investment Corporation assigned to Windward Partners its rights under the Exchange Agreement. (CR 97, Exhibit "B").

Two years later, in May, 1977, Mrs. Marks entered into the Purchase Agreement with the HHA. That Agreement recited that the HHA intended to exercise its power to acquire the Property by eminent domain and that Mrs. Marks reasonably believed that her interest in the Property would in fact be condemned if a sale to the HHA were not arranged. (CR 97, Exhibit "F," at 2.)

The Second Amended Complaint (CR 97) identified the Property as Parcel 2 under the Exchange Agreement and alleged that Mrs. Marks breached the Exchange Agreement by her execution of the Purchase Agreement. Mrs. Marks' Purchase Agreement with the HHA, however, specifically recognized the interest of Windward Partners in the Property, expressly referred to Windward Parnters

option, and unequivocally was made subordinate to Windward Partners' Exchange Agreement.

The Purchase Agreement provided:

> NOW, THEREFORE, in consideration of the conditions and agreements set forth herein, Owner (Mrs. Marks) and Condemnor (HHA) do hereby mutually agree as follows:
>
> 1. It is understood that the Mauka Waiahole Properties (the Property) are subject to certain purchase rights of Windward Parnters, a partnership registered in the State of Hawaii, under that certain Land Exchange and Purchase Agreement dated May 21, 1975, and November 2, 1976, by and between Owner as Seller and Pao Investment Corporation as Buyer whose interest is now held by Windward Partners (hereinafter collectively referred to as the Land Exchange Agreement). Condemnor acknowledges that it has heretofore received and reviewed copies of the foregoing Land Exchange Agreement. Under the Land Exchange Agreement, Windward Partners has an option to acquire, and upon the occurrence of certain conditions is obligated to acquire, the Mauka Waiahole Properties at any time on or before November 2, 1977; Windward Partners being in any event obligated to acquire the Mauka Waiahole Properties if it does not

> give Owner written notice of termination of its right to acquire by November 12, 1977. It is understood and agreed that nothing herein shall in any manner impair or prohibit Owner from observing or performing any and all obligations on her part running in favor of Windward Partners under the Land Exchange Agreement.
>
> Upon the expiration of the right of Windward Partners to acquire the Mauka Waiahole Properties, . . . Owner thereupon shall so notify Condemnor in writing . . . and pursuant to which notice Condemnor agrees to acquire by or under threat of condemnation and Owner agrees to sell the Mauka Waiahole Properties. . . .

Purchase Agreement, at 2-3 (emphasis added).

The Purchase Agreement stipulated further that, in the event that Windward Partners became committed to acquire the Property, but thereafter defaulted in consummating the acquisition, the HHA would purchase the property only on the conditions, inter alia, that Windward Partners waived all of its purchase rights under the Exchange Agreement and disclaimed any further interest in the Property. Purchase Agreement Agreement, at 3-4.

Thus, the Purchase Agreement expressly recognized and deferred to Windward Partners' rights in the Property.

Summary of the Argument

This is a garden variety federal jurisdiction case, involving no questions of substantive federal law, in which the dismissing of the complaint by the District Court was affirmed by the Court of Appeals, both Courts relying on well established application of federal jurisdiction statutes and policy.

Petitioners have failed to establish any special or important reason for this Court granting a writ of certiorari under Rule 19. No authority has been presented to establish that any rights of Petitioners were taken or, if taken, compensable.

Having dismissed the "causes of action" alleging a claim under 42 U.S.C. Sec. 1983 there was no federal jurisdiction over the Private Defendants. No pendent party jurisdiction is recognized in the federal courts.

ARGUMENT

I. The Court of Appeals was correct in its decision that the purchase by the State under threat of condemnation of property which Plaintiffs held an option to purchase, was not taking without compensation when the purchase was made subject to the option.

Petitioners miss the mark in their argument that the lower court erred in failing to find that Petitioners' option to purchase real property was a constitutionally protected property right which was taken by concerted actions of Respondents without compensation. While the Court of Appeals did state that there was no Hawaii decision on the issue of whether an option was a compensable property right, the Court of Appeals assumed the option was a compensable property right in its decision. The Court of Appeals went on to state that it was the loss of financing opportunity, not the loss of the option, for which Petitioners were seeking compensation. The Court of Appeals held this to be an interest which was not compensable.

Petitioners cite to this Court numerous cases dealing with the issue of what constitutes a compensable property right. Petitioners argue that because some of the decisions cited hold that options are compensable, this Court should grant a writ of certiorari. Petitioners rely upon Richmond Elks Hall Assn. vs. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) to support their position that a writ of certiorari is justified. The Court of Appeals in its decision in the instant case made certain to distinguish Richmond from the case at bar. In Richmond, plaintiff brought an inverse condemnation action against a city redevelopment agency seeking just compensation for a de facto taking. The court in Richmond found the plaintiffs as fee owners of the property in question had the rights to use, sell, lease and encumber the property and that defendant's interference with these rights effected a

compensable taking. The right which Petitioners contend was interferred with in this case was their ability to obtaining financing to exercise an option. This is a far cry from the rights of a landowner to use, sell, lease and encumber. It is this distinction that the Court of Appeals made when it found that Petitioners had not established a compensable property interest. There is no allegation by the Petitioners that the real property which was the subject of their option was rendered unsaleable in the open market, that its use for its intended purpose became limited, that its market value decreased, that rental receipts declined, or that insurance became difficult to obtain, the only effect upon the Petitioners was an alleged difficulty in obtaining financing. Petitioners failed to establish a direct and substantial interference with the use and enjoyment of their property.

Petitioners claim that as a natural consequence of Respondents acts there was a

taking by inverse condemnation. Inverse condemnation actions involve claims that governmental land use or regulations are unduly restrictive or that governmental activities substantially interfere with the use and enjoyment of plaintiff's property. Abandoned, protracted, or improper condemnation proceedings generally fall within the second class of inverse condemnation cases. Sackman, "Factors in Inverse Condemnation," Institute on Planning, Zoning and Eminent Domain, (1978) and Sackman, "Condemnation Blight - Part II," Institute on Planning, Zoning and Eminent Domain (1976). The cases of Agins v. City of Tiburon, 447 U.S. 225 (1980) and Thompson v. Tualatin Hills Park & Rec., 496 F. Supp. 530 (D. Or. 1980) have held that where the condemning authority acted reasonably and in good faith, the institution and abandonment of eminent domain proceedings did not constitute an unconstitutional taking. In the cases of Amen v. Dearborn, 363 F.Supp. 1267 (E.D.

Mich. 1973) and Foster v. City of Detroit, 254 F.Supp. 655, aff'd., 405 F.2d 138 (6th Cir. 1968) the condemning authorities announced their plans concerning anticipated condemnations. They then delayed the actual condemnations and at the same time refused to issue building permits, failed to control pollution and discouraged improvements. The Amen and Foster courts held these actions constituted de facto takings. Bad faith or abuse of eminent domain authority was not alleged by Petitioners or argued in their briefs or memorandum.

The California Supreme Court has held that before there is a de facto taking there must be a "physical invasion or direct legal restraint." City of Walnut Creek v. Leadership Housing Systems, Inc., 73 Cal. App. 3d 611, 620, 140 Cal. Rptr. 690, 694 (1977). The California Supreme Court held that fluctuations in value during the process of governmental decision-making, absent extraordinary delay

or particularly harsh zoning regulations do not constitute an unlawful taking. The New York Court of Appeals stated a similar rule in City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). Numerous federal courts have held that absent a substantial burden on the property rights of the owner and absent a showing that the burden is a product of governmental action that amounts to an abuse of the condemnation authority no inverse condemnation cause of action exists. Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974); Thomas W. Garland, Inc. v. City of St. Louis, 450 F.Supp. 239 (E.D. Mo. 1978); and Madison Realty Co. v. City of Detroit, 315 F.Supp. 367 (E.D. Mich. 1970).

Absent any authority for Petitioners position that loss of financing opportunities is a compensable property interest and absent an allegation or evidence of bad faith

regarding the purchase contract which was subservient to Petitioners' option, and the purchase having been made after the option expired, no special or important reason has been established to justify this Court granting a writ of certiorari.

II. The Court of Appeals was correct in its decision that Plaintiffs' claims against the State Defendants were barred in the federal judicial system by the Eleventh Amendment of the Constitution of the United States of America.

Petitioners have failed completely to present any basis for this Court granting certiorari on the question of whether the claims against the State Defendants were barred by the Eleventh Amendment; no conflict of decisions between Courts of Appeal, no important state or territorial question, no unsettled question of federal law, no failure to follow applicable decision of this Court and no significant departure from the accepted and usual course of judicial proceedings was raised in their brief. The rulings made by

the District and Circuit Courts are consistent with the established law of federal jurisdiction.

Respondent Marks concurs in and relies upon the arguments of the State Defendants with respect to the issue of Court of Appeals' ruling on the effect of the Eleventh Amendment upon the claims against the State Defendants.

III. The Court of Appeals was correct in its decision that because the Eleventh Amendment stripped it of jurisdiction to consider Petitioners claims against the State Defendants and because it had dismissed the conspiracy count for failure to state a cause of action, the court lacks jurisdiction to consider any claims against the private Defendants.

The Second Amended Complaint alleges five causes of action. Three of of the causes are based in contract and directed to the Private Defendants. A fourth cause of action is directed at the State Defendants only alleging a claim under 42 U.S.C. Section 1983. The remaining cause of action alleges a conspiracy between all Respondents again claiming deprivation of property rights without compensation in violation of 42

U.S.C. Section 1983.

Petitioners argue that under the case of Dennis v. Sparks, 449 U.S. 24 (1980), the federal courts had jurisdiction over the Private Defendants in spite of the immunity of the State Defendants. The assumptions made by Petitioners in setting forth the above argument are unjustified and therefore the argument is without merit. Petitioners assume the complaint states a Section 1983 claim and the State Defendants are immune. If those assumptions were valid, Petitioners could then with authority argue Dennis v. Sparks as supportive. The error in their assumption is that the Court of Appeals held there was no Section 1983 claim. Without independent federal jurisdiction, no jurisdiction exists.

When the Court of Appeals found no Section 1983 to have been stated, it did not limit that to only State Defendants, it dismissed those causes of action as to all Respondents.

That having been done, there remained only three causes of action, none having independent federal jurisdiction.

The case authority is clear and uncontroverted without an independent basis of jurisdiction, the federal courts have no power to exercise pendent jurisdiction over the remaining claims. Aldinger v. Howard, 427 U.S. 1 (1976). In Aldinger, Plaintiff alleged a claim under 42 U.S.C. Section 1983 and a state law claim. The Supreme Court upheld the dismissal of the state law claim on the ground that since the county was not suable under under 42 U.S.C. Section 1983, there was no independent basis of jurisdiction and therefore no pendent jurisdiction over the state law claims against the county.

The Court of Appeals was correct in its refusal to exercise jurisdiction over a purely state claim by Petitioners against the Private Defendants. Joinder of claims not parties is the object of the doctrine of

pendent jurisdiction. In the absence of any alleged independent jurisdiction over the Private Defendants and taking into account the decision that the causes of action alleging federal jurisdiction over the State Defendants and the Private Defendants were dismissed for failure to state a claim, no federal jurisdiction exists over the Private Defendants.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii; MAR 30 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on March 30, 1983, three copies of the within were served on the parties and their attorneys of record by personally delivering the same to their last known address:

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